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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

ERIE COUNTY,
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEW YORK AND DAVID GASKELL, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE DIVISION OF EQUALIZATION AND ASSESSMENT AND HIS SUCCESSORS IN OFFICE,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Dissatisfied with the petitioners' presentation of the questions presented, respondent states the questions as follows:

I. Whether a federal court may determine the true market value of railroad property under U.S.C. §11503 (a statute which forbids states from taxing rail transportation property at discriminatory ratios of assessed value to true market value) based on appraisal methods different from the state's "chosen valuation method?"

II. Whether a federal court may certify a defendants' class under Fed. R. Civ. Pro. 23(b)(3) where the class is comprised of more than 700 taxing jurisdictions (each of which collects property taxes from the same railroad-taxpayer), where the amount of tax in most jurisdictions is based on railroad values fixed by a common state agency, and where the principal dispute involves the true market value of the railroad's property and the validity under federal law of the taxable values determined by the state agency?

LIST OF PARTIES TO THIS PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are four co-defendants who have filed three separate petitions for certiorari: petitioner in No. 94-1776 is North Rockland Central School District ("North Rockland"), a tax levying and collecting jurisdiction within Rockland County, New York; petitioner in No. 94-1787 is Erie County, New York ("Erie County"), a subdivision of the State of New York and a tax levying and collecting jurisdiction; and petitioners in No. 94-1789 are the State Board of Equalization and Assessment of the State of New York, an agency of the State of New York, and David Gaskell, the Executive Director of the Division of Equalization and Assessment (referred to collectively as the "SBEA").

Respondent in all three cases is the plaintiff below, Consolidated Rail Corporation ("Conrail"), a wholly-owned subsidiary of Conrail, Inc., the shares of which are publicly traded. Subsidiaries and affiliates of Conrail, Inc. and Consolidated Rail Corporation that are not wholly-owned are:

Akron & Barberton Belt Railroad Company;
Albany Port Railroad Corporation;
Amtech Logistics Corp.;
Belt Railway Company of Chicago;
Calumet Western Railway Company;
CU Energy Partnership, L.P.;
Indiana Harbor Belt Railroad Company;
Lakefront Dock & Railroad Terminal Company;
Locomotive Management Services;
Nicholas, Fayette & Greenbrier Railroad Company;
Peoria & Pekin Union Railway Company;

Triple Crown Services Company;
TTX Company; and
Railroad Association Insurance, Ltd.

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Nos. 94-1776; 94-1787; 94-1789

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Petitioners,

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CONSOLIDATED RAIL CORPORATION,
Respondent.

CONSOLIDATED BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (reprinted in Appendix A to the petitions, pp. A1-A27) is reported at 47 F.3d 473. The oral findings of the United States District Court for the Southern District of New York, dated January 7, 1994 (reprinted in Appendix A to the petitions, pp. A28-A43) are unreported; the preliminary injunction order entered by the district court January 25, 1994 (reprinted in Appendix A to the petitions, pp. A44-A49) is unreported. The order of the district court certifying the defendants' class (reprinted in Appendix A to the petitions, pp. A50-A54) is unreported.

JURISDICTION

The jurisdictional grounds are adequately stated in the petitions. The petitions seek review of an interlocutory order of the Second Circuit affirming the grant of a preliminary injunction and the certification of a defendants' class.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. §11503.

The language of 49 U.S.C. §11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See*, Pub. L. No. 95-473, §3(2), 92 Stat. 1466 (1978); *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 458 n.1 (1987). Section 306 is reprinted in Appendix A to this Brief; the provisions of 49 U.S.C. §11503 are reprinted in Appendix A to the petitions, pp. A55-A57.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with petitioners' respective statements of the case, Conrail adopts as its counterstatement the Second Circuit's description of the case as set forth in Appendix A to the petitions, pp. A1 through A11, and states the following:

1. 49 U.S.C. §11503 and Prior Decisions of This Court Interpreting It.

The federal statute at issue in this case, 49 U.S.C. §11503, prohibits state tax discrimination against interstate rail carriers and declares certain state conduct - such as the discriminatory assessment of rail transportation property for ad valorem tax purposes - an unreasonable burden on interstate commerce. §11503(c) expressly confers jurisdiction on federal district courts to grant such equitable relief as may be necessary to prevent violations of the Act, notwithstanding 28 U.S.C. §1341, the amount in controversy or the citizenship of the parties.

The specific subsection at issue, §11503(b)(1), prohibits a state or its subdivisions from assessing rail transportation property at a higher ratio of assessed value to "true market value" than other commercial and industrial property in the same assessment jurisdiction. As is apparent from the statutory formula prescribed by §11503(b)(1), an unlawful assessment can result from the overvaluation of railroad property relative to its true market value; from the underassessment of other commercial and industrial property relative to its true market value; or from a combination of both factors.

In *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454 (1987), this Court reversed a Tenth Circuit decision which held that a railroad could not complain under §11503 of the overvaluation of its property by state officials absent a "strong showing of purposeful overvaluation...with discriminatory intent."[1] This Court ruled that "in order to compare the actual assessment ratios [under §11503(b)(1)], it is necessary to determine what the 'true market values' are." 481 U.S. at 461. This Court rejected the proposition that state-determined values are "not subject to further judicial scrutiny in the federal courts," 481 U.S. at 462, but reserved the issue of whether a railroad may "challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value." 481 U.S. at 464 n.5.[2]

2. The New York Litigation.

In this case, Conrail's real property was subjected to ad valorem tax in New York for the 1993 tax year based on assessed values calculated by the SBEA and certified by the SBEA to local assessors. The SBEA's aggregate assessments of Conrail's New York property for the 1993 tax year exceeded those calculated by the SBEA for 1992 by more than 70%.

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[1] *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, No. 85-1657 (10th Cir. May 2, 1986) slip op at 3, *rev'd*, 481 U.S. 454 (1987).

[2] The only other case to come before this Court under §11503, *Dept. of Rev. of Oregon v. ACF Industries, Inc.*, ____ U.S. ____, 114 S.Ct. 843, 127 L.Ed.2d 165 (1992), involved §11503(b)(4), a subsection not at issue in this case.

In calculating Conrail's assessments, the SBEA used a valuation procedure which the SBEA has described as a "cost approach."[3] In essence, the SBEA estimated the "reproduction cost new less depreciation (RCNLD)" of Conrail's track structure and improvements and the value of Conrail's land. The SBEA then multiplied these cost estimates by a statutorily-prescribed "economic factor"[4] which reduced the SBEA's cost estimates to a "taxable value."[5]

Based on an independent appraisal which considered Conrail's capitalized income, the market value of Conrail's debt and equity securities, and the depreciated historical cost of Conrail's assets, Conrail filed this suit alleging that the "true market value" of its real property in New York was less than half the SBEA's estimate of "taxable value," and that the SBEA's assessments of Conrail's property were discriminatory within the meaning of §11503(b)(1). Conrail sought a preliminary and permanent injunction prohibiting the further assessment, levy or collection of the discriminatory portion of Conrail's 1993 ad valorem taxes.

In its complaint and motion papers, Conrail sought preliminary relief under Fed. R. Civ. Pro. 65(d) against

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[3] Brief For Defendants-Appellants before the Second Circuit, p.6.

[4] New York Real Property Tax Law (RPTL), §489-hh.

[5] The SBEA multiplied Conrail's "taxable value" within each jurisdiction by the SBEA's "state equalization rate" to produce Conrail's "railroad ceiling" - or its maximum assessed value - within each jurisdiction. *See* Affidavit of Peter Mafilios, Nov. 17, 1993, ¶¶19, 20.

the SBEA and all New York assessing, levying or collecting jurisdictions who had used the SBEA's "railroad ceilings" as the basis for taxing Conrail's rail transportation property. In the alternative, Conrail sought certification of a defendants' class (comprised of the more than 700 New York assessing, levying or collecting jurisdictions to which Conrail pays ad valorem tax annually) and requested a preliminary injunction against the class.

Petitioners opposed Conrail's motion for preliminary injunction and moved to dismiss on the ground that the district court had no jurisdiction under §11503 to consider a challenge to the SBEA's "chosen valuation method," and that Conrail was limited merely to challenging errors in the SBEA's "application" of its "chosen valuation method." Petitioners relied on *Chesapeake Western Ry. v. Forst*, 938 F.2d 528, (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1577, 118 L.Ed.2d 220 (1992), in which the Fourth Circuit held that §11503 "does not provide a basis for parties to challenge a State's preferred accounting method." Petitioners (other than the SBEA) also opposed class certification.

The district court below granted Conrail's motion for preliminary injunction,[6] and the Second Circuit affirmed, declining to follow Chesapeake. The Second Circuit stated:

> The *Chesapeake* court viewed the method of appraisal as a matter of state policy that

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[6] The SBEA states in its petition, p.9, that the preliminary injunction was granted "[w]ithout an evidentiary hearing." This is true; but no party requested the opportunity to produce live witnesses and all evidence was submitted on affidavit and counter-affidavit.

> was beyond the reach of the 4-R Act. We do not accept that interpretation of the statute. What the 4-R Act prohibits is discrimination against railroads in the ratios of two sets of numbers: assessed values and true market values of the railroad's property vis-à-vis those of other commercial and industrial properties. To avoid the prohibited discrimination, the SBEA must apply the same valuation standards and methods to the railroad property as are used on the commercial and industrial properties to which it is compared. If the Act were to be interpreted, as defendants would have it, so that the SBEA could adopt a special appraisal method for railroads alone, then the whole nondiscrimination objective of the statute could be circumvented.

47 F.3d at 482; App. A to petitions, pp. A19-20.

The district court also certified a defendants' class (comprised of all New York assessing, levying or collecting jurisdictions to which Conrail pays ad valorem tax) under Fed. R. Civ. Pro. 23(b)(3). Reviewing the certification order under principles of "pendant appellate jurisdiction," the Second Circuit affirmed, holding that the case met each of the criteria of Fed. R. Civ. Pro. 23(a)(1) through (a)(4), and that common issues predominated within the meaning of Rule 23(b)(3).

This case has proceeded through discovery as a class action for more than fifteen months and no class member has opted out. Discovery in this case is virtually

complete, except for the exchange of expert witness reports and the depositions of the parties' experts. This case has also been preliminarily consolidated for trial with a related case involving the 1994 tax year, in which a preliminary injunction has also issued.[7]

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[7] *Consolidated Rail Corporation v. State Board of Equalization and Assessment of the State of New York*, No. 94 Civ. 6764 (CLB), (S.D.N.Y., complaint filed Sept. 16, 1994).

REASONS FOR DENYING THE WRIT

1. The Petitions Seek Review of an Order on Appeal From an Interlocutory Decree.

Generally, this Court will await final judgment in the lower courts before exercising its certiorari jurisdiction irrespective of whether the case meets the criteria of Supreme Court Rule 10.[8] *Virginia Military Institute v. United States*, ____ U.S. _____, 113 S.Ct. 2431, 2432, 124 L.Ed.2d 651 (1993). Under long-established principles, this Court will not review an order of the circuit court on appeal from an interlocutory decree unless certiorari is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 382-385 (1893); *see also, Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *generally*, R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* §4.18, pp. 224-226 (6th Ed. 1986).

The petitions in this case seek review of an interlocutory order of the Second Circuit affirming the

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[8] Although a conflict exists between the Fourth Circuit's decision in *Chesapeake* and the Second Circuit's decision here, no conflict exists between this case and the Ninth Circuit's decision in *Burlington Northern R.R. v. Dept. of Rev.*, 23 F.3d 239 (9th Cir. 1994), despite the SBEA's assertions to the contrary. (SBEA petition, p.18). In *Burlington Northern*, the trial court permitted the railroad to introduce proof of its true market value by "valuation methods" different from those used by the state and rejected certain of the state's appraisal "methods." Although the district court deferred to the state's techniques under Washington's burden of proof rules, it did not circumscribe in any way the railroad's appraisal evidence.

district court's grant of a preliminary injunction and certification of a defendants' class. The decisions of the courts below are based on a partial record and preliminary findings of fact, and are not final. This Court should decline to exercise its jurisdiction to decide the issues presented until it has had the benefit of a full evidentiary record, final findings of fact and conclusions of law by the district court, and final appellate review by the court of appeals.

2. The First Question Presented (Whether A State's "Chosen Valuation Method" Is Subject To Challenge) Is Not Sufficiently "Clear-cut" And Informed By The Record To Warrant Certiorari.

Although certiorari may be granted in an interlocutory case where there exists "an important and clear-cut issue of law that is fundamental to the further conduct of the case," *Randolph Central School District v. Alrich*, ___ U.S. _____, 113 S. Ct. 440, 121 L.Ed.2d 359 (1992); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), this is not such a case. The first question presented, while simply stated, is not sufficiently "clear-cut" for this Court to make a studied and informed decision at this stage of the proceedings.

In *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454 (1987), this Court held unequivocally that federal courts have jurisdiction under §11503 to determine railroad valuation issues. This case presents the narrower question of whether such jurisdiction is somehow limited by a state's choice of railroad valuation "methods." If certiorari is granted, petitioners will no doubt endorse a restrictive interpretation of federal jurisdiction along the lines of

Chesapeake, notwithstanding Congress' objectives and the absence of any language in §11503 which circumscribes the federal courts' power to determine "true market value." Conrail, by contrast, will advocate a plain-language interpretation of §11503 which allows railroads to establish the "true market value" of their property by any valuation technique consistent with generally-accepted appraisal principles.

To evaluate the parties' arguments regarding the proper construction of §11503(b)(1), this Court should have a clear picture of the purpose and financial theory underlying the competing "methodologies" involved in this case, and of the full economic and practical consequences of foreclosing federal judicial scrutiny of a state's "chosen valuation method." The continued efficacy of §11503 as an anti-discrimination measure may depend on this Court's construction, and this Court should not undertake the analysis without a solid legal and factual predicate.

At this preliminary stage of the proceedings, there are a number of legal and factual disputes and positional uncertainties bearing on the question presented, the existence of which argues forcefully against a grant of certiorari. These include:

a. What is the reach of the jurisdictional rule advocated by the petitioners? If certiorari is granted, petitioners apparently will urge upon this Court a variant of the *Chesapeake* rule, which precludes federal judicial scrutiny of a state's "chosen valuation method" but permits a railroad to challenge the state's "application" of its method. 938 F.2d at 531. However, no lower court has yet defined what constitutes "methodology" or what

constitutes "application" of methodology.[9] In the context of this case, the SBEA has not yet defined what it means by its "chosen valuation method," nor defined what it means by "application." While the basic steps of the SBEA's railroad appraisal procedure are well known, it is not clear which specific steps the SBEA regards as sacrosanct and which steps are subject to challenge.[10]

For example, one of the steps in the SBEA's appraisal procedure involves calculation of an "economic factor," by which the SBEA reduces its estimate of the railroad's "reproduction cost new less depreciation" to a "taxable value." Conrail's experts have attacked the economic factor as an arbitrary adjustment that is utterly meaningless from a market value perspective. Is Conrail permitted to challenge the SBEA's economic factor under the "application" exception to the *Chesapeake* rule, or is Conrail foreclosed from *any* challenge to the SBEA's economic factor because it represents the state's "chosen valuation method?"

Because there has been no trial, the parameters of the restrictive rule endorsed by petitioners in theory have not been defined in practice, nor subjected to lower court consideration. Without a full factual record, it is

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[9] The Seventh Circuit has described the distinction between "methodology" and "application of methodology" as "ephemeral." *Burlington Northern R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990).

[10] It is not sufficient for the SBEA to claim that *every* step in its process of calculating railroad ceilings is "methodology" immune from challenge. If adopted, such an interpretation would gut *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, and require the federal court merely to accept the state's appraised value.

impossible for any appellate court to determine where the line between "methodology" and "application" should be drawn or, for that matter, whether it can or should be drawn at all.

b. What is the purpose of the valuation procedure to which the SBEA would require federal courts to defer? The SBEA itself has taken contradictory positions on this issue: on the one hand the SBEA asserts that its valuation procedures are designed to calculate a "partial exemption" known as the "railroad ceiling," *not* to "value railroad property for purposes of a property tax."[11] On the other hand, the SBEA asserts that its railroad ceilings are "established by using a standard method of valuation chosen by the state legislature known as the cost approach."[12]

Although the SBEA's "railroad ceilings" are indisputably used by local assessors as the basis for railroad taxes in the vast majority of New York assessing jurisdictions, the SBEA's "railroad ceilings" are not based on "true market value" estimates, nor were they designed to be. If the SBEA's method is *not* intended to reflect or estimate "true market value," it will do so only by coincidence.

It must be emphasized that *no* witness for the SBEA (or any other defendant) has yet testified that the values calculated for Conrail's property by the SBEA represent "true market value." Although the SBEA asserts

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[11] Brief of Defendants-Appellants before the Second Circuit, p.6.

[12] *Ibid.*

in its petition, p.8, that "the SBEA calculated the true market value of Conrail's property for 1993 as $974 million," no one from the SBEA has testified that $974 million was a "true market value" estimate for Conrail's realty, or that $974 million was intended to represent "true market value." Indeed, the SBEA employee who calculated the number expressly disavowed on deposition any opinion that $974 million represents "true market value" and described the number instead as, "[T]he resulting number after applying the economic factor to the estimated reproduction cost. I would not call it a true market value."[13]

Thus, this Court should not be asked to foreclose federal judicial scrutiny of the SBEA's valuation procedures until discovery and trial are complete and this Court knows the real purpose of the SBEA's procedures.

c. Do the SBEA's valuation procedures comport with normal railroad appraisal principles, such that reasonably knowledgeable persons would regard the result as an indicator of "true market value"? No lower court has ever decided whether, under the *Chesapeake* rule, a state's methodology must bear some relationship to generally accepted appraisal principles in order to be immune from challenge.[14] Although the SBEA asserts

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[13] Deposition of Peter Mafilios, Aug. 2, 1994, pp. 100-102.

[14] In Conrail's view, even if *Chesapeake* is correct, the methodology chosen by the state must at the very least be capable of determining true market value if correctly applied. If the state does not even attempt to determine true market value, but rather applies a mechanistic formula that was never designed to produce an indicator of true market value, railroads *must* be able to challenge that formula in court.

that its valuation procedures are consistent with normal appraisal principles,[13] its valuation procedures indisputably resulted in a 70% increase in Conrail's assessments in a single year without any significant change in Conrail's inventory of property in New York during the year. If the SBEA's valuation procedures produced the correct market value in 1992, how can they produce a number 70% higher in 1993 and still be correct?[14]

Conrail's experts have also described the SBEA's procedures as disconnected from market value and economically arbitrary. Since the courts below have addressed this issue in only preliminary fashion, Conrail respectfully submits that this Court should have the benefit of a full evidentiary record and the analysis of the lower courts before deciding it.

d. What are the requirements of New York law with respect to the valuation of railroad property? Petitioners make much of the requirements of New York law regarding the valuation of railroad real property and

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[13] Brief of Defendants-Appellants before the Second Circuit, p.6.

[14] The SBEA asserts in its petition, p.10, that the district court "implicitly affirmed the correctness of the state's chosen valuation method" by basing its 1993 injunction on the SBEA's 1992 railroad ceilings for Conrail. This is incorrect for two reasons: (1) the district court's injunction was plainly intended to enjoin the tax windfall to local jurisdictions resulting from the 70% increase in Conrail's assessments between 1992 and 1993, not to "affirm" any method; and (2) the SBEA's valuation method changed between 1992 and 1993. Which "chosen valuation method" did the district court "implicitly affirm": the SBEA's 1992 method, or the 1993 method which produced a 70% increase in assessed value?

assert that New York law "prohibits the use of the 'unitary method' as well as a capitalization and stock and debt approach to value." (SBEA petition, p.11.) Although Conrail denies the state's methods are controlling under §11503, Conrail also disputes the petitioners' characterization of New York law.

Before establishment of New York's "railroad ceiling" procedure in 1961, reproduction cost was presumed to be the upper limit of taxable value for railroad realty. *People ex rel. Lyford v. Allen*, 286 App. Div. 621, 146 N.Y.S. 186, 188 (1955). Other evidence of value was admissible, however, to establish a lower value. *Lyford; People ex rel. Lehigh Valley Ry. v. Harris,* 168 Misc. 685, 6 N.Y.S.2d 794 (Sup. Ct. 1938); *People ex rel. New York Central R.R. v. Thompson*, 156 Misc. 536, 282 N.Y.S. 269 (Sup. Ct. 1935). Although reproduction cost was incorporated into the "railroad ceiling" procedure, this procedure was designed to fix tax limits and does not purport to estimate "true market value." Because of the existence of the railroad ceiling procedure, the "permissible approaches" to valuing railroad real property from a market value perspective have not been examined by New York courts for more than 30 years. (The seminal "specialty property" cases in New York which approve of reproduction cost, *e.g., Matter of Brooklyn Union Gas*, 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985) do not involve railroads.)

Contrary to the SBEA's assertions, certain aspects of New York's current "railroad ceiling" procedure *do* incorporate "unitary" concepts, such as the SBEA's use of uniform data for estimating the cost of track structure throughout the state and the SBEA's use of system-wide earnings to calculate the "economic factor." Furthermore,

in its own public documents, the SBEA has described its current system as "duplicative, poorly understood, and fragmented," and has strongly endorsed a unitary approach to valuing railroad property.[15]

All of the foregoing legal and factual subissues underscore the practical and semantical difficulty of crafting a jurisdictional rule based on perceived distinctions between "method" and "application of method" and argue against certiorari at this time.

3. With Regard to the Issue of Class Certification, No Conflict Exists Among the Circuit Courts, or Between the Decisions Below and the Decisions of This Court.

Two petitioners, Erie County and North Rockland, argue that the Second Circuit "erred" in affirming the district court's decision to certify a defendants' class under Fed. R. Civ. Pro. 23(b)(3). However, these petitioners merely reargue the merits of the district court's certification order and cite no conflict among the circuits with respect to the appropriateness of a defendants' class under Fed. R. Civ. P. 23(b)(3).

The class certification issue is not appropriate for certiorari because there is *no* disagreement among the federal courts (or even the commentators) that a defendants' class may be certified under Rule 23(b)(3). *See, e.g. Newberg on Class Actions*, Vol. 1, §4.66 (3d ed. 1992) and the cases cited therein. While some courts and commentators have argued that Rule 23(b)(2) does not allow certification of a defendants' class, no

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[15] SBEA *Survey of Railroad and Utility Taxation Among the States*, December 1993.

similar controversy surrounds Rule 23(b)(3). *See, e.g.*, 7A C. Wright, A. Miller and M. Cane, *Federal Practice and Procedure*, §1775 (2d ed. 1986); *Newberg on Class Actions*, Vol. 1, §4.65 (3d ed. 1992). Thus, Erie County's citation of a Rule 23(b)(2) case for the proposition that the lower courts are "confused," *Hanson v. East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), *proceedings deferred*, 484 U.S. 1001 (1987), is simply inapposite.

Petitioners argue that New York assessing jurisdictions "[act] independently in fixing the assessed values of Conrail's taxable properties within [their] boundaries" and that the district court erred in identifying questions of law and fact which are common to the members of the class and which predominate. (Erie County petition, p.21.) However, the district court specifically rejected petitioners' factual premise and held that the vast majority of New York's assessing jurisdictions actually tax Conrail's property on the basis of taxable values fixed by the SBEA, not by local assessors. Thus, although petitioners continue to dispute the facts, they present no legal issue worthy of certiorari.

4. The Second Issue Raised By The SBEA (Whether §11503 Requires A State To Apply The Same Method Of Valuing Commercial and Industrial Property As It Uses For Railroads) Meets None Of The Criteria Of Supreme Court Rule 10.

The SBEA presents the question of whether §11503 "require[s] a state to apply the same method of valuing other commercial and industrial property as it applies to rail transportation property." (SBEA petition, p.i.) This is not an issue insofar as Conrail is concerned,

and is based on a misreading of the Second Circuit's opinion.

The Second Circuit's decision does not "require" states to value *commercial and industrial* property in any particular manner. The Second Circuit merely observes that, if cost, market and income approaches are used for commercial and industrial properties to estimate market value, those approaches should also be considered for railroad properties. The Second Circuit does *not* reverse the §11503 equation as petitioners suggest, nor require states to treat commercial and industrial properties in the same way railroads are treated. As in all §11503 cases, New York remains free to tax its citizens in any form it chooses, so long as it does not tax the *railroad industry* in a discriminatory manner.

Thus, the SBEA's second question presented is a non-issue which merits no consideration by this Court.

5. The SBEA's Third Issue (Whether §11503 Requires A Sales Assessment Ratio Study) Meets None Of The Criteria Of Supreme Court Rule 10.

The SBEA argues that the lower courts erred by accepting Conrail's preliminary statistical evidence regarding the "ratio of assessed value to true market value" of other commercial and industrial property. The SBEA asserts that §11503(c) "requires" proof by a "random sampling method known as a sales assessment ratio study," and that Conrail's evidence was not a *sales* assessment ratio study. (SBEA petition, pp. 24-26.)

The SBEA cites no conflict among the decisions of the lower courts on this evidentiary issue because none

exists. The lower courts have long recognized that, while §11503(c) expresses an evidentiary preference for the results of a sales assessment ratio study, courts have wide discretion to consider other evidence. *See, e.g., Clinchfield R.R. v. Lynch,* 784 F.2d 545, 554 (4th Cir. 1986) (personal property studies); *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446, 451 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (10th Cir. 1981) (appraisals of public utilities).

The SBEA's real complaint is that the district court accepted Conrail's statistical evidence, particularly Conrail's calculation of the state-wide average level of assessment for commercial and industrial property (which was based on the SBEA's own data). It must be emphasized, however, that Conrail also introduced preliminary evidence of pervasive discrimination on a jurisdiction-by-jurisdiction basis (also using the SBEA's commercial and industrial data and estimation procedures). Furthermore, at the trial of this case, Conrail intends to introduce *sales* assessment ratio study analyses of unlawful discrimination on a jurisdiction-by-jurisdiction basis.

Thus, as the Second Circuit has already held, the district court did not abuse its discretion in accepting Conrail's preliminary statistical proof of the level of assessment of other commercial and industrial property, and the SBEA has presented no ground for certiorari on this issue.

6. No Special Or Important Reasons Exist For Granting The Writ.

Petitioners argue this case is important because the decision below has an "impact on the comity between the

federal courts and state governments that is essential to the principles of federalism," and the preliminary injunction has "affected virtually every local municipal budget in New York State."[16] (SBEA petition, p. 27; Erie County petition, p. 25.)

As this Court noted in *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 14 n. 10 (1983), impairment and disruption of state finances are inevitable consequences of congressional regulation of state taxation. As this Court specifically held in *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. at 464, comity and disruption to local finances are irrelevant considerations in §11503 cases. *See also, Southern Ry. v. State Board of Equalization*, 715 F.2d 522, 523 n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Conrail's property in New York comprises less than 1% of the taxable value in the vast majority of New York assessing jurisdictions in which it operates. If a portion of those taxes is unlawfully exacted, it cannot be collected, irrespective of good purposes for which it might be used.

7. The Cost Savings Predicted If Certiorari Is Granted Are Unlikely.

Petitioners assert that immediate review is necessary to furnish guidance on the further conduct of the case and to aid them in the selection of valuation experts. Petitioners argue that, if this Court grants certiorari and forecloses federal judicial scrutiny of the

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[16] This is hyperbole; Conrail operates in less than one-third of the municipal districts of the state leaving more than two-thirds unaffected by this litigation.

state's "chosen valuation method," petitioners will be spared the expense of retaining valuation experts to rebut the appraisals of Conrail's experts. (SBEA petition, p.29; Erie County petition, p.25.)

This argument presupposes that, if this Court endorses petitioners' restrictive rule, Conrail's overvaluation claim will disappear and obviate the necessity for *any* valuation experts. This will not happen.[17] Although a successful petition by the defendants might result in fewer factual issues to be tried, the remaining valuation issues will be substantial and complex, and valuation experts will still be necessary on both sides. Thus, the economies petitioners predict are chimerical.

The real issue raised by this case is what factors and evidence of "true market value" may the district court consider in determining the "true market value" of railroad property. Even the restrictive *Chesapeake* rule recognizes that railroads are entitled to produce "independent evidence" of their true market value, provided the railroad "limits its evidence to factors that may properly be taken into account under the State's chosen methodology." *Richmond Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (explaining *Chesapeake*). Thus, Conrail intends to introduce expert evidence at trial regarding the SBEA's "misapplication" of its own methodology so there will be sufficient facts on the record for an appellate court to review the trial court's decision

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[17] Unless this Court reverses *Burlington Northern R.R. v. Oklahoma Tax Comm'n.* and holds that overvaluation claims are not legally cognizable under §11503, Conrail will be litigating its true market value in federal court.

on appeal even if this Court eventually decides that *Chesapeake* is correct. Since the SBEA and the other petitioners will likely reject Conrail's expert testimony on "misapplication" issues and rely on expert witnesses of their own, the petitioners will have to pay valuation experts regardless of the legal framework within which they testify.

It must be emphasized that petitioners have already engaged valuation experts familiar with the case. In opposing Conrail's application for preliminary injunction in the 1994 case, petitioners tendered expert witnesses who use many of the same railroad valuation techniques advocated by Conrail's experts. Some of these same petitioners' experts have also assisted petitioners' counsel in planning and conducting documentary discovery in this case. Thus, petitioners have already retained experts who have performed substantial work on this case and, in seeking certiorari, petitioners simply hope to avoid paying some of these experts for preparing "true market value" appraisals. While such cost savings may be of practical importance to the litigants, they are no reason for granting certiorari. *See, e.g., Ticor Title Insurance Co. v. Brown*, ___ U.S. ____, 114 S. Ct. 1359, 1362, 128 L.Ed.2d 33 (1994).

CONCLUSION

Although 49 U.S.C. §11503 is important legislation, the principal issue presented by the petitions raises numerous subsidiary issues of law, of fact, and of judgment that should be analyzed within the context of a full record, including final analysis by the courts below. Denial of the petitions at this stage of the proceedings does not preclude petitioners from raising these same issues in a later petition after final judgment. The petitions should, therefore, be denied.

Respectfully Submitted,

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